JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

14 June 2012 (*)

(Environment – Regulation (EC) No 1367/2006 – Obligation of the Member States to protect and improve ambient air quality – Temporary exemption granted to a Member State – Request for internal review – Refusal – Measure of individual scope – Validity – Aarhus Convention)

In Case T•396/09,

Vereniging Milieudefensie, established in Amsterdam (Netherlands),

Stichting Stop Luchtverontreiniging Utrecht, established in Utrecht (Netherlands),

represented by A. van den Biesen, lawyer,

applicants,

v

European Commission, represented initially by P. Oliver, W. Roels and A. Alcover San Pedro, subsequently by P. Oliver, A. Alcover San Pedro and E. Manhaeve, and finally by P. Oliver, A. Alcover San Pedro and B. Burggraaf, acting as Agents,

defendant,

supported by

Kingdom of the Netherlands, represented by C. Wissels, Y. de Vries, J. Langer and M. de Ree, acting as Agents,

by

European Parliament, represented initially by L. Visaggio and A. Baas, and subsequently by L. Visaggio and G. Corstens, acting as Agents,

and by

Council of the European Union, represented by M. Moore and F. Naert, acting as Agents,

interveners,

APPLICATION for annulment of Commission Decision C(2009) 6121 of 28 July 2009 rejecting as inadmissible the applicants' request for review by the Commission of Decision C(2009) 2560 final of 7 April 2009 granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1),

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich, President, I. Wiszniewska-Białecka (Rapporteur) and M. Prek, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2011,

gives the following

Judgment

Background to the dispute

1 The applicants are Vereniging Milieudefensie, an association governed by Netherlands law established in Amsterdam (Netherlands), whose object is protection of the environment and improvement of air quality in the Netherlands and Stichting Stop Luchtverontreiniging Utrecht, a foundation governed by Netherlands law established in Utrecht (Netherlands), which campaigns against air pollution in the Utrecht region.

2 On 15 July 2008, the Kingdom of the Netherlands notified the Commission of the European Communities, in accordance with Article 22 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1), that, in nine zones, it had postponed the attainment deadline for the annual limit value for nitrogen dioxide and that it was availing itself of an exemption from the obligation to apply the daily and annual limit values for particulate matter which passes through an inlet with a 50% efficiency cut-off at 10 µm aerodynamic diameter ('PM_{10}').

3 On 7 April 2009, the Commission adopted Decision C(2009) 2560 final ('the

decision of 7 April 2009').

4 Article 1 of the decision of 7 April 2009 states:

'1. No objections are raised to the postponement of the deadline for attaining the annual limit value for nitrogen dioxide set out in Annex XI to Directive 2008/50/EC in Zones 1 to 8 specified in the Annex to this Decision. The postponement shall apply until 31 December 2014.

2. No objections are raised against the postponement of the deadline for attaining the annual limit value for nitrogen dioxide in Zone 9 specified in the Annex to this Decision, provided that the national air quality plan, the [Nationale Samenwerkingsprogramma Luchtkwaliteit] (NSL), and the relevant regional plan are adjusted with a view to ensuring that compliance with the annual limit value for nitrogen dioxide is achieved by 31 December 2012. ...'

5 Article 2 of the decision of 7 April 2009 states:

'No objections are raised to the ... exemptions from the obligation to apply the limit values for PM_{10} set out in Annex XI to Directive 2008/50/EC ...

The exemption shall apply until 10 June 2011.'

6 Under Article 3 of the decision of 7 April 2009, the Kingdom of the Netherlands is to provide the Commission with certain data concerning the limit values specified in Directive 2008/50.

7 By letter of 18 May 2009, the applicants submitted a request to the Commission for internal review of the decision of 7 April 2009 under Article 10(1) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

8 By Decision C(2009) 6121 of 28 July 2009 ('the contested decision'), the Commission rejected the applicants' request for internal review. It stated:

'You have requested a review of the decision of 7 April 2009 on the grounds that the Netherlands does not meet the conditions laid down in Article 22 of Directive 2008/50/EC and that therefore the Commission should have raised objections to the request for postponement of the deadline for attaining the limit values for [nitrogen dioxide] and for exemption from the obligation to apply the limit values for PM_{10}.

...

It is apparent from a reading of Article 10 in conjunction with the definition of 'administrative act' given in Article 2(1)(g) of Regulation No 1367/2006 that a request for internal review may be made only in respect of a measure of individual scope taken under environmental law, by a Community institution or body, and having legally binding and external effects.

Without going into the question of whether or not the other conditions for the admissibility of the request contained in Title IV of Regulation No 1367/2006 are met, the Commission considers that the decision of 7 April 2009 is not a measure of individual scope.

The Commission construes your request as meaning that you consider that the decision constitutes an administrative act of individual scope (a decision), in particular since it is addressed to a single Member State, cited by name ...

A decision addressed to a particular Member State may, however, constitute a measure having general application if its purpose is to approve measures which apply to one or more categories of person defined in a general and abstract manner.

Case-law exists according to which derogations from a specific general regime which the Commission has authorised by means of confirmatory decisions under a specific directive have the same legal nature as the directive itself if those Commission decisions are addressed in abstract terms to classes of persons who are not specifically defined and apply to objectively defined situations. In such cases, the decisions (although they are called decisions) must be considered to be measures of general application. See order of 16 February 2005 in Case T•142/03 *Fost Plus VZW* v *Commission* [2005] ECR II•589, paragraph 47 and the case-law cited.

In the light of the scope of the derogation provided for in Article 22 of Directive 2008/50/EC, and the conditions attaching to it, the Commission is of the view that the derogation applies to an objectively defined situation which has legal effects on categories of persons defined in a general and abstract manner. Consequently, decisions which are based on Article 22 of Directive 2008/50/EC must be regarded as 'derogations from a general regime' within the meaning of the case-law cited above and those decisions therefore have the same general application as that directive.

Moreover, it should be pointed out that application of Article 22 of Directive 2008/50/EC presupposes that the Member State has established an air quality plan for the zones or agglomerations to which the postponement of the deadline and the exemption are to apply. That plan provides for the adoption and implementation of measures that apply to persons who are not specifically defined in objectively defined situations. The decision

based on Article 22 of Directive 2008/50/EC, in which the Commission did not raise objection to the notification by the Netherlands, is based on the air quality plan provided by that Member State.

In the light of the foregoing factors, the Commission is of the opinion that your request for internal review does not relate to an administrative measure within the meaning of Article 2(1)(g) of Regulation No 1367/2006. Consequently, the Commission declares your request inadmissible ...'

Procedure and forms of order sought

9 By application lodged at the Court Registry on 6 October 2009, the applicants brought the present action.

10 By separate document lodged at the Court Registry on 19 October 2009, the applicants lodged an application for interim relief, requesting in essence that the President of the General Court suspend operation of the contested decision pending a decision in the main proceedings or pending adoption by the Commission of a new decision regarding the request for internal review.

11 By order of 17 December 2009, the President of the General Court dismissed the action for interim relief as manifestly inadmissible. The costs were reserved.

12 By documents lodged at the Court Registry on 14, 15 and 26 January 2010, respectively, the European Parliament, the Kingdom of the Netherlands and the Council of the European Union applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. Those applications were granted by order of the President of the First Chamber of the General Court of 11 March 2010. The European Parliament, the Kingdom of the Netherlands and the Council lodged their statements in intervention on 28 May 2010. The Commission and the applicants lodged their observations on those statements on 15 and 19 July 2010, respectively.

13 Following a change in the composition of the Chambers of the Court, the Judge•Rapporteur was assigned to the Seventh Chamber, to which the present case was accordingly allocated.

14 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

15 At the hearing on 13 September 2011, the parties presented oral argument and

replied to oral questions put by the Court.

16 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to examine the merits of the request for internal review, within a fixed period to be determined by the Court;

– order the Commission to pay the costs.

17 The Commission, supported by the Kingdom of the Netherlands, the European Parliament and the Council, contends that the Court should:

– dismiss the action as unfounded;

– order the applicants to pay the costs.

Law

The claim that the Court should issue directions

18 With regard to the applicants' second head of claim, to the effect that the Court should order the Commission to examine the merits of the request for internal review and set a fixed period for those purposes, it should be noted that, according to settled case-law, the jurisdiction of the Courts of the European Union is limited, in an action for annulment, to reviewing the legality of the contested measure and the General Court may not, in the exercise of its jurisdiction, issue directions to institutions of the European Union (Case C•5/93 P *DSM* v *Commission* [1999] ECR I•4695, paragraph 36, and Case T•145/98 *ADT Projekt* v *Commission* [2000] ECR II•387, paragraph 83). It is for the institution concerned to adopt, under Article 266 TFEU, the measures necessary to implement a judgment given in proceedings for annulment (Case T•67/94 *Ladbroke Racing* v *Commission* [1998] ECR II•1, paragraph 200, and judgment of 29 September 2009 in Joined Cases T•225/07 and T•364/07 *Thomson Sales Europe* v *Commission*, not published in the ECR, paragraph 221).

19 The applicants' second head of claim is therefore inadmissible.

The claim for annulment

20 In support of their claim for annulment, the applicants raise two pleas in law. The applicants' main plea is that the Commission was wrong to hold that their request for internal review of the decision of 7 April 2009 was inadmissible on the ground that that decision was a measure of general application. That plea should be construed as alleging, in essence, infringement of Article 10(1) of Regulation No 1367/2006, read in conjunction with Article 2(1)(g) of that regulation.

21 In the alternative, the applicants claim that, if the first plea were to be rejected, it would be necessary to find that Article 10(1) of Regulation No 1367/2006 contravenes Article 9(3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 ('the Aarhus Convention'), in so far as it limits the concept of 'acts' for the purposes of Article 9(3) of the Aarhus Convention to 'administrative act [s]', which are defined in Article 2(1)(g) of Regulation No 1367/2006, moreover, as 'measure[s] of individual scope'.

The first plea: infringement of Article 10(1) of Regulation No 1367/2006, read in conjunction with Article 2(1)(g) of that regulation

22 By the present plea, which is their main plea, the applicants submit in essence that, by rejecting as inadmissible their request for internal review of the decision of 7 April 2009, the Commission infringed Article 10(1) of Regulation No 1367/2006.

23 Under Article 10(1) of Regulation No 1367/2006, any non-governmental organisation which meets the criteria set out in Article 11 of that regulation is entitled to make a request for internal review to the European Union institution which adopted an administrative act under environmental law. The term 'administrative act' as used in that provision is defined in Article 2(1)(g) of Regulation No 1367/2006 as referring to any measure of individual scope taken by a European Union institution under environmental law and having legally binding and external effects.

24 In the present case, the Commission rejected the applicants' request for internal review of the decision of 7 April 2009 as inadmissible on the ground that, since that decision was not a measure of individual scope, the request for internal review did not relate to an administrative act for the purposes of Article 10(1) of Regulation No 1367/2006. The applicants challenge that assessment and argue that the decision of 7 April 2009 is a measure of individual scope.

25 In order to determine whether the Commission was right in finding that the applicants' request for internal review did not meet the conditions laid down in Article 10 (1) of Regulation No 1367/2006, it is therefore necessary to examine whether the decision of 7 April 2009 constitutes a measure of individual scope for the purposes of Article 2(1)(g) of Regulation No 1367/2006.

26 According to case-law, in order to determine the scope of a measure, the Courts of the European Union should not look merely at the official name of the measure but should first take account of its purpose and its content (see, to that effect, Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471). Accordingly, a decision which is addressed to a Member State is regarded as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract (see, to that effect, order in Case C•503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I•2217, paragraph 71).

27 Moreover, where an instrument lays down limitations, or allows derogations, which are temporary in nature or territorial in scope, they form an integral part of the body of provisions within which they are found and, in the absence of any misuse of powers, they are of the same general nature as those provisions (Case C•298/89 *Gibraltar* v *Council* [1993] ECR I•3605, paragraph 18; order in Case T•417/04 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [2007] ECR II•641, paragraph 49; and judgment of 1 July 2008 in Case T•37/04 *Região autónoma dos Açores* v *Council* , not published in the ECR, paragraph 33).

28 Lastly, the Courts of the European Union have held that derogations from the body of general rules which take the form of confirmatory decisions adopted by the Commission under a provision of a directive partake of the general nature of that directive, given that they are addressed in abstract terms to undefined classes of persons and applied to objectively defined situations (see order in Case T•142/03 *Fost Plus* v *Commission* [2005] ECR II•589 ('the order in *Fost Plus* '), paragraph 47 and the case-law cited).

29 In the present case, it should be noted first that Directive 2008/50 is a measure of general application in so far as it establishes, in abstract and objective terms, a body of general rules for assessing and limiting pollutant emissions.

30 Secondly, under Article 22 of Directive 2008/50, Member States may enjoy a temporary derogation from the obligation to comply with the limit values laid down in that directive, provided that certain conditions are met and subject to scrutiny by the Commission. Article 22 of Directive 2008/50 states:

'1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide ... cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by ... information ... related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline.

2. Where, in a given zone or agglomeration, conformity with the limit values for PM_{10} as specified in Annex XI cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State shall be exempt from the obligation to apply those limit values until 11 June 2011 provided that the conditions laid down in paragraph 1 are fulfilled and that the Member State shows that all appropriate measures have been taken at national, regional and local level to meet the deadlines.

3. Where a Member State applies paragraphs 1 or 2, it shall ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI for each of the pollutants concerned.

4. Member States shall notify the Commission where, in their view, paragraphs 1 or 2 are applicable, and shall communicate the air quality plan referred to in paragraph 1 including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied. In its assessment, the Commission shall take into account estimated effects on ambient air quality in the Member States, at present and in the future, of measures that have been taken by the Member States as well as estimated effects on ambient air quality of current measures and planned measures to be proposed by the Commission.

Where the Commission has raised no objections within nine months of receipt of that notification, the relevant conditions for the application of paragraphs 1 or 2 shall be deemed to be satisfied.

If objections are raised, the Commission may require Member States to adjust or provide new air quality plans.′

31 Thirdly, in the decision of 7 April 2009, adopted pursuant to Article 22(4) of Directive 2008/50 following the notification made by the Kingdom of the Netherlands, the Commission did not raise any objections to postponement of the deadline for attaining the limit values for nitrogen dioxide in Zones 1 to 8 or to the exemption from the obligation to apply the limit values for PM_{10}. As regards postponement of the deadline for attaining the limit values for nitrogen dioxide in Zone 9, no objections were raised provided that the NSL and the relevant regional plan were adjusted. That decision has effects on the air quality in certain zones of the Netherlands and on all the people in those zones.

32 The decision of 7 April 2009, adopted by the Commission pursuant to Article 22 (4) of Directive 2008/50, thus constitutes a derogation from the general body of rules established by Directive 2008/50, which partakes of the general nature of the directive since it is addressed in abstract terms to undefined classes of persons and applies to objectively defined situations.

33 The approach adopted in the order in *Fost Plus* , paragraph 28 above, can accordingly be transposed to the present case. First of all, both Directive 2008/50 and European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) – at issue in the order in *Fost Plus* – establish, in abstract and objective terms, a general body of rules relating, respectively, to the fight against air pollution and the recovery of packaging and packaging waste. Also, like Article 6(6) of Directive 94/62, Article 22 of Directive 2008/50 allows Member States to derogate from the general rules established by that directive, provided that certain conditions are met and subject to scrutiny by the Commission. Lastly, decisions taken by the Commission under Article 22 of Directive 2008/50, like confirmatory decisions adopted by the Commission under Article 6(6) of Directive 94/62, partake of the general nature of the directive, given that they are addressed in abstract terms to undefined classes of persons and apply to objectively defined situations.

34 Consequently, it must be concluded that, since the decision of 7 April 2009 constitutes a measure of general application, it cannot be regarded as a measure of individual scope for the purposes of Article 2(1)(g) of Regulation No 1367/2006.

35 That conclusion is not affected by the applicants′ arguments.

36 As regards, first, the applicants′ arguments to the effect that the decision of 7 April 2009 is a measure of individual scope, it should be noted first of all that the fact

that the decision of 7 April 2009 is addressed to the Kingdom of the Netherlands is not a decisive factor for the purposes of identifying its scope in the light of the case-law referred to in paragraphs 26 to 28 above. It has been held by the Court of Justice that a decision which was addressed to a single Member State was of general application (order in *Saint-Gobain Glass Deutschland* v *Commission*, paragraph 26 above, paragraph 71). Moreover, Case C•3/00 *Denmark* v *Commission* [2003] ECR I•2643, paragraphs 39 and 40, relied on by the applicants, is not relevant in the present case since the problem addressed in that judgment is different from the issue raised in the present case. In *Denmark* v *Commission*, the Court found that the procedure leading to a Commission decision under Article 95(4) and (6) EC, authorising maintenance of a national provision which derogated from a measure of general application, could not be regarded as part of the legislative process resulting in adoption of the measure of general application. Accordingly, the issue was not whether the decision in question was a measure of individual or general application but whether that decision was part of a legislative process. It follows that the applicants' argument based on the fact that the decision of 7 April 2009 is addressed solely to the Kingdom of the Netherlands cannot succeed.

37 It should also be noted that, contrary to the assertions made by the applicants, the fact that the Commission is competent to assess on an individual basis the request for a derogation submitted by a Member State and is able to grant or refuse that request, or to grant it subject to certain conditions, is not a decisive factor for the purposes of identifying the scope of the decision of 7 April 2009 in the light of the case-law referred to in paragraphs 26 to 28 above.

38 Lastly, the applicants' argument that the decision of 7 April 2009 is a measure of individual scope since it entails legal effects only for the Kingdom of the Netherlands is not convincing. It should be noted that that decision allows the Kingdom of the Netherlands to adopt acts of general application which apply to all natural or legal persons residing or engaged in activities in the Netherlands zones and agglomerations covered by that decision. As a consequence, that decision entails legal effects not only for the Kingdom of the Netherlands but also for all those persons.

39 As regards, secondly, the applicants' arguments that, since Directive 2008/50 is addressed to the Member States, which retain a measure of discretion in implementing the directive, and not to citizens or undertakings, that directive does not contain 'measures which apply to one or more categories of persons defined generally and in the abstract', it should be noted that a directive is a normative, general and abstract measure (order in Case C•10/95 P *Asocarne* v *Council* [1995] ECR I•4149, paragraph 37). Accordingly, the fact that the Kingdom of the Netherlands retains a measure of discretion as regards the

choice of the appropriate form and method for implementing Directive 2008/50 does not call into question the general application of that directive. Consequently, the applicants' argument cannot succeed.

40 Thirdly, it is beside the point for the applicants to argue that, since one of their contentions had been that the Kingdom of the Netherlands did not satisfy the conditions laid down in Directive 2008/50 for obtaining a derogation, the Commission should have reviewed the decision of 7 April 2009. Considerations relating to the merits of the request for internal review have no bearing on its admissibility.

41 It follows from the above that, since the decision of 7 April 2009 does not constitute a measure of individual scope, it cannot be categorised as an administrative act for the purposes of Article 2(1)(g) of Regulation No 1367/2006. Accordingly, that decision could not form the subject of a request for internal review under Article 10(1) of that regulation. It follows that, in the light of those provisions, the Commission did not err in declaring inadmissible the applicants' request for internal review of the decision of 7 April 2009.

42 Consequently, the present plea must be rejected.

The second plea: Article 10(1) of Regulation No 1367/2006 is unlawful since it limits the concept of 'acts' in Article 9(3) of the Aarhus Convention to 'administrative act[s]' defined in Article 2(1)(g) of that regulation as 'measure[s] of individual scope'

43 By the alternative plea, the applicants submit in essence that, if the contested decision does not fall to be annulled on the basis of the first plea, it must be held that, by limiting the concept of 'acts' in Article 9(3) of the Aarhus Convention to 'administrative act[s]', which are defined in Article 2(1)(g) of Regulation No 1367/2006 moreover as 'measure[s] of individual scope', Article 10(1) of Regulation No 1367/2006 contravenes that provision of the Aarhus Convention. Given that the Aarhus Convention prevails over Regulation No 1367/2006 and that Article 10(1) of that regulation contravenes the Aarhus Convention, the latter provision ought not to be applied.

44 It must be considered that, by that plea, the applicants are raising a plea of illegality under Article 241 EC in respect of Article 10(1) of Regulation No 1367/2006, read in conjunction with Article 2(1)(g) of that regulation.

45 The Commission and the interveners contend that this plea should be rejected.

46 The European Parliament and the Council dispute the admissibility of this plea, one of the grounds relied on being that the application initiating proceedings does not contain any claim that the Court should declare that Regulation No 1367/2006 is

unlawful.

47 In that regard, it should be borne in mind that, according to case-law, the plea of illegality provided for under Article 241 EC gives expression to a general principle conferring upon any party to proceedings the right to challenge, indirectly, for the purposes of obtaining the annulment of a decision adversely affecting that party, the validity of earlier measures which constitute the legal basis for the decision at issue (Case T•20/98 *Q* v *Council* [1999] ECR-SC I•A•147 and II•779, paragraph 47). Thus, in the present case, the plea of illegality in respect of Regulation No 1367/2006 is raised indirectly by the applicants with a view to obtaining annulment of the contested decision adopted on the basis of that regulation. Accordingly, the admissibility of the plea of illegality is not conditional upon a claim that Regulation No 1367/2006 is unlawful.

48 Moreover, the Council contends that it is unclear whether the applicants are questioning the legality of Regulation No 1367/2006 in the light of the Aarhus Convention, since they appear to be undecided as to whether Regulation No 1367/2006 conflicts with the Aarhus Convention or whether Regulation No 1367/2006 can be construed in accordance with that convention. The Council doubts, therefore, whether the applicants' alternative plea offers the level of clarity and precision required under Article 44(1)(c) of the Rules of Procedure of the General Court.

49 In response, it need merely be noted that, in paragraph 39 of the application initiating proceedings, the applicants clearly state that Article 2(1)(g) of Regulation No 1367/2006 must not be applied in so far as it contravenes the Aarhus Convention, since it is not possible to interpret that provision in a manner consistent with the convention.

50 It follows that the plea of illegality in respect of Article 10(1) of Regulation No 1367/2006, in so far as it limits the concept of 'acts' in Article 9(3) of the Aarhus Convention to 'administrative act[s]' as defined in Article 2(1)(g) of that regulation, is admissible.

51 As regards the merits of that plea, it should be noted that it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements prevail over secondary Community legislation (see, to that effect, Case C•61/94 *Commission* v *Germany* [1996] ECR I•3989, paragraph 52, and Case C•311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I•609, paragraph 25).

52 The Aarhus Convention was signed by the European Community and

subsequently approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1). The institutions are accordingly bound by that convention, which prevails over Regulation No 1367/2006. It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with the Aarhus Convention.

53 According to case-law, the Courts of the European Union may examine the validity of a provision of a regulation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and where, in addition, the provisions of the treaty appear, as regards their content, to be unconditional and sufficiently precise (Case C•308/06 *Intertanko and Others* [2008] ECR I•4057, paragraph 45, and Joined Cases C•120/06 P and C•121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I•6513, paragraph 110).

54 However, where the Community has intended to implement a particular obligation assumed under an international agreement, or where the measure makes an express *renvoi* to particular provisions of that agreement, it is for the Court to review the legality of the measure in question in the light of the rules laid down in that agreement (see, to that effect, with regard to the Agreement establishing the World Trade Organisation, Case C•149/96 *Portugal* v *Council* [1999] ECR I•8395, paragraph 49; Case C•93/02 P *Biret International* v *Council* [2003] ECR I•10497, paragraph 53; and Case C•377/02 *Van Parys* [2005] ECR I•1465, paragraph 40; see also, to that effect, with regard to the General Agreement on Tariffs and Trade (GATT), Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22, and Case C•69/89 *Nakajima* v *Council* [1991] ECR I•2069, paragraph 31). Accordingly, where a regulation is intended to implement an obligation imposed on the European Union institutions under an international treaty, the Courts of the European Union must be able to review the legality of that regulation in the light of the international treaty without first having to determine whether the conditions set out in paragraph 53 above are satisfied.

55 In *Nakajima* v *Council* , paragraph 28, the Court found that the applicant was not relying on the direct effect of the provisions of the GATT Anti-Dumping Code but was questioning the validity of a regulation indirectly, in accordance with Article 241 EC, by invoking one of the grounds for review of legality referred to in Article 230 EC, that is to say, infringement of the Treaty or of any rule of law relating to its application. The Court found that the regulation challenged by the applicant in that case had been adopted in order to meet international obligations

incumbent on the Community, which – as the Court has consistently held – is accordingly under an obligation to ensure compliance with the GATT and its implementing measures (see *Nakajima* v *Council* , paragraph 31 and the case-law cited; see also, to that effect, Case C•352/96 *Italy* v *Council* [1998] ECR I•6937, paragraphs 20 and 21).

56 The case-law developed in the cases relating to the GATT and World Trade Organisation agreements was also applied in Case C•162/96 *Racke* [1998] ECR I•3655, in which the Court examined the validity of a regulation in the light of customary international law in so far as it found that 'the individual concerned was invoking fundamental rules of customary international law against the disputed regulation, which had been taken pursuant to those rules and deprived that individual of the rights to preferential treatment granted to it by the Cooperation Agreement' (*Racke* , paragraph 48).

57 In the present case, it should be noted that, as in the case which gave rise to the judgment in *Nakajima* v *Council* , paragraph 28, the applicants are questioning indirectly, in accordance with Article 241 EC, the validity in the light of the Aarhus Convention of a provision of Regulation No 1367/2006.

58 It should also be noted that Regulation No 1367/2006 was adopted to meet the European Union's international obligations under Article 9(3) of the Aarhus Convention. Article 1(1)(d) of Regulation No 1367/2006 states that the objective of that regulation is to contribute to the implementation of the obligations arising under the Aarhus Convention by granting, inter alia, 'access to justice in environmental matters at European Union level under the conditions laid down by this Regulation'. Also, recital 18 in the preamble to Regulation No 1367/2006 refers expressly to Article 9(3) of the Aarhus Convention. Moreover, it is apparent from the case-law of the Court of Justice that obligations arise under Article 9(3) of the Aarhus Convention and that Regulation No 1367/2006 is intended to implement that provision with respect to the institutions of the European Union (see, to that effect, Case C•240/09 *Lesoochranárske zoskupenie* [2011] ECR I•0000, paragraphs 39 and 41).

59 It is appropriate, therefore, to assess the validity of the provision which the applicants claim is unlawful in the light of Article 9(3) of the Aarhus Convention, which entails determining whether the concept of 'acts' in Article 9(3) of the Aarhus Convention can be construed as covering only 'measure[s] of individual scope'.

60 Article 9(3) of the Aarhus Convention provides:

'In addition and without prejudice to the review procedures referred to in paragraphs 1

and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'.

61 The term 'acts', as used in Article 9(3) of the Aarhus Convention, is not defined in that convention. According to well-established case-law, an international treaty must be construed by reference to the terms in which it is framed and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express to this effect general customary international law, state that a treaty is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see Case C•344/04 *IATA and ELFAA* [2006] ECR I•403, paragraph 40 and the case-law cited).

62 It is appropriate first of all to recall the objectives of the Aarhus Convention.

63 Thus, it emerges from the sixth and eighth recitals in the preamble to the Aarhus Convention that the authors of that convention, '[r]ecognising that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself', consider that, 'to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, ... acknowledging in this regard that citizens may need assistance in order to exercise their rights'. Moreover, the tenth recital to the Aarhus Convention states that 'in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns'.

64 In addition, Article 1 of the Aarhus Convention, which is entitled 'Objective', provides that '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention'.

65 It must be held that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and

purpose of the Aarhus Convention, such limitation is not justified.

66 Also, as regards the terms in which Article 9(3) of the Aarhus Convention is framed, it should be noted that, under those terms, the Parties to that Convention retain a certain measure of discretion with regard to the definition of the persons who have a right of recourse to administrative or judicial procedures and as to the nature of the procedures (whether administrative or judicial). Under Article 9(3) of the Aarhus Convention, only 'where they meet the criteria, if any, laid down in [the] national law, [may] members of the public have access to administrative or judicial procedures'. However, the terms of Article 9(3) of the Aarhus Convention do not offer the same discretion as regards the definition of the 'acts' which are open to challenge. Accordingly, there is no reason to construe the concept of 'acts' in Article 9(3) of the Aarhus Convention as covering only acts of individual scope.

67 Lastly, so far as the wording of the other provisions of the Aarhus Convention is concerned, it should be noted that, under Article 2(2) of that convention, the concept of 'public authority' does not cover 'bodies or institutions acting in a judicial or legislative capacity'. Accordingly, the possibility that measures adopted by an institution or body of the European Union acting in a judicial or legislative capacity may be covered by the term 'acts', as used in Article 9(3) of the Aarhus Convention, can be ruled out. That does not mean, however, that the term 'acts' as used in Article 9(3) of the Aarhus Convention can be limited to measures of individual scope. There is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity. Measures of general application are not necessarily measures taken by a public authority acting in a judicial or legislative capacity.

68 It follows that Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope.

69 In consequence, in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of 'acts' in Article 9(3) of the Aarhus Convention to 'administrative act[s]' defined in Article 2(1)(g) of that regulation as 'measure[s] of individual scope', it is not compatible with Article 9(3) of the Aarhus Convention.

70 That conclusion is not affected by the interveners' arguments.

71 The European Parliament and the Council contend that the concept of 'acts' as used in Article 9(3) of the Aarhus Convention must, under European Union law, be limited to measures of individual scope because the internal review procedure, not being independent of the judicial procedure provided for under Article 12 of Regulation No 1367/2006, must comply with Article 230 EC and, in particular, with the condition

that the contested act must be of individual and direct concern to the applicant. In that connection, it is sufficient to recall the content of Article 12(1) of Regulation No 1367/2006.

72 Article 12(1) of Regulation No 1367/2006 provides that a non-governmental organisation which has made a request for internal review pursuant to Article 10 of that regulation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty, hence in accordance with Article 230 EC. However, whatever the scope of the measure covered by an internal review as provided for in Article 10 of Regulation No 1367/2006, the conditions for admissibility laid down in Article 230 EC must always be satisfied if an action is brought before the Courts of the European Union.

73 Moreover, the conditions laid down in Article 230 EC – and, in particular, the condition that the contested act must be of individual and direct concern to the applicant – apply also to measures of individual scope which are not addressed to the applicant. A measure of individual scope will not necessarily be of individual and direct concern to a non-governmental organisation which meets the conditions laid down in Article 11 of Regulation No 1367/2006. Contrary to the assertions made by the European Parliament and the Council, limiting the concept of 'acts' exclusively to measures of individual scope does not ensure that the condition laid down in Article 230 EC – that the contested act must be of direct and individual concern to the applicant – will be satisfied.

74 The Council also contends that Article 9(3) of the Aarhus Convention implies a discretion leaving sufficient freedom of manoeuvre to allow the obligation arising under that provision to be transposed into national law by means of national procedures supplemented by references to the Court for preliminary rulings.

75 In that regard, it should be pointed out that, in order for a non-governmental organisation which meets the conditions laid down in Article 11 of Regulation No 1367/2006 for making a request for internal review to be able to challenge indirectly before a national court a measure of general application adopted by an institution of the European Union, that measure of general application must have been transposed into national law. As it is, not all measures of general application adopted by institutions of the European Union in the field of the environment have been transposed into national law by means of a measure which may be challenged before a national court.

76 Moreover, the Council's argument is not supported by evidence showing how, in the present case, the applicants could bring an action before a national court challenging the measure of general application in respect of which they have asked the

Commission to conduct an internal review.

77 It follows that the plea of illegality raised in respect of Article 10(1) of Regulation No 1367/2006, read in conjunction with Article 2(1)(g) of that regulation, must be upheld – as must, in consequence, the second plea in law. The contested decision must therefore be annulled.

Costs

78 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, including those relating to the proceedings for interim relief, in accordance with the form of order sought by the applicants.

79 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. Accordingly, the Kingdom of the Netherlands, the European Parliament and the Council must bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Annuls Commission Decision C(2009) 6121 of 28 July 2009;

2. Orders the European Commission to bear, in addition to its own costs, the costs incurred by Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, including those relating to the proceedings for interim relief;

3. Orders the Kingdom of the Netherlands, the European Parliament and the Council of the European Union to bear their own costs.

Dittrich Wiszniewska-Białecka Prek

Delivered in open court in Luxembourg on 14 June 2012.

[Signatures]

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*Language of the case: Dutch.